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in a position to know the ins and outs of the whole case and should be best fitted to determine the minor matters of procedure as they arise.

Of course there are disadvantages attending any loosening of our procedure. But despatch is an essential of justice just as is stability. It is a significant sign when public sentiment favors doing away with many of the technical protections thrown about the accused, and feels safe in looking for substantial justice at the hands of our judges. The allowing of a prisoner to waive, by mere voluntary absence or otherwise, his right to be present at the rendition of the verdict seems in line with this general trend of sentiment.

INTERSTATE COMMERCE—REBATES UNDER THE EILKIN'S LAW OF 1903.

Interstate commerce as coming within the purview of the constitutional provision that "Congress shall have power . . . to regulate commerce with foreign nations, among the several states and with the Indian tribes," has been the subject of various litigations, and perhaps equally as varied *dicta* by the courts. The judicial construction of this clause begins in 1824 with the case of *Gibbons v. Ogden,* wherein Chief Justice Marshall declared that the power to regulate, being the power to prescribe rules by which commerce is to be governed, is complete as vested in Congress and acknowledges no limitations other than as prescribed in the constitution. The line of demarcation between interstate and intra-state commerce being under the control of the individual state, was laid down by the "original package" rule, first stated in 1827 in the case of *Brown v. Maryland.* This line of difference involving the power of the state to legislate upon interstate commerce; in the absence of any regulation by Congress, not being decided, remained a *vexata quaestio* until 1851, when the jurisdiction of the state courts was confined to those questions of local interest included under police regulations, and that, too, only in the absence of any regulations by Congress. This view was not universally adopted. The Granger cases held state regulations of interstate rates valid in case of the absence of legislation by Congress. But in 1886 the Supreme Court of United States reversed the Supreme Court of Illinois in *Wabash R. Co. v. Ill.,* 118 U. S. 557, denying to the states the power to any such regulations whatever. In the same year the Tennessee drummer case denied the power of the state to impose any tax whatever upon interstate commerce. It was then in the absence of statutory regulations whatever, except the Act of 1866, Revised Statutes, Section 5258, authorizing the formation of continuous lines and through shipments by agreements, that the Interstate Commerce Act was passed on Feb. 4, 1887.

The wide diversity of opinions during the debates in Congress, giving rise to the caustic characterization of the act as one which "nobody understands, nobody wants, and everybody is going to vote for," was fully warranted by subsequent judicial interpretation of its provisions, especially as to what were the "substantially similar circumstances and conditions" of the fourth section. Subsequent

amendments have at least proved that it did not meet the demands of the situation, among which was the Elkin's Act of 1903, providing that, "Every person or corporation who shall offer, grant or give, or solicit, accept or receive any such rebates, concessions or discriminations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

This Act was brought before the courts in the case of *United States v. The Standard Oil Co. of Ind.,* 155 Fed. 305, upon an indictment on 1903 counts, each charging the movement of one car of oil as an interstate shipment. The constitutionality of the Act was sustained against the contention of the defendant to the effect that: (1) the natural and inherent right to make a private contract was involved, (2) authorizing common carriers to fix such rates as when published shall become binding, is a delegation of legislative power, (3) judicial power vests in the commission in that it is to pass upon the ultimate reasonableness or unreasonableness of the rate charged, (4) the "commerce clause" of the constitution does not empower Congress to forbid and make criminal the act of defendant in accepting a rate less than that fixed and filed as required by the Act. The first contentions of defendant above was denied on the ground of the public character of railroads as declared by frequent holdings of the courts. *Louisville & N. R. Co. v. Brown,* 123 Fed. 946; *Commonwealth v. Interstate Consol. St. Ry. Co.,* (Mass.), 73 N. E. 530. The Supreme Court of United States has frequently ruled adversely to contention (2) of defendant. *Chicago & N. W. R. Co. v. Dey,* 35 Fed. 866. *Railroad Commission Cases,* 116 U. S. 307. The courts have ruled against (3) above, in that common law remedies are not barred by the statute. *Gen. Sts.* 1901, section 5998. *Mo. Pac. R. Co. v. State,* 77 P. (Kan.) 286. Contention (4) of defendant is denied and the receiving of rebates thereby made a criminal offense on the ground that Congress, having the right to establish uniformity in rates, may adopt whatever remedial measures may be necessary to enforce them. Congress has primary power to protect interstate commerce. *Charge to Grand Jury,* 2 Sprague (U. S.) 279.

The question of rebates, though perhaps for the first time the subject of legislation in the Interstate Commerce Act, is by no means a new one to the American courts. The more general term, discrimination, as involving rebates, has for a long time been the subject of litigation. There are *dicta* in the English cases and many cases may be found to sustain this view, that at common law, common carriers were bound to make reasonable, but not equal charges, and that one of whom a fair compensation was exacted had no cause of complaint because another obtained a similar service for less. *Branley v. Southeastern R. Co.,* 12 C. B. (N. S.) 63, 75; *Oxlade v. N. E. Ry. Co.,* 40 Law & Eq. 234. So it has been usual in English railroad charters to insert clauses expressly requiring reasonable facilities to be afforded to all on equal terms and enacting special remedies for unjust discriminations. *McDufee v. Portland & Rochester R.,* 52 N. H. 430. So the "equality clause" in 8 and 9

Vict. .c 20, section 9, that tolls shall be charged equally to all persons and after the same rate in respect to all goods of the same description passing over the same portion of the same line under the same circumstances supplements whatever defect there may have been in the common law in the prohibition of unreasonable discriminations.

The most recent decisions which have passed upon the obligations of railway companies to the public have been almost uniform in following the principles of the common law, not only prohibiting discriminations, but requiring the strictest impartiality in the conduct of their business, as declared by Supreme Court of U. S. in 1901, in *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92; *Pierce on Law of Railroads*, p. 498. Since, upon the question of discrimination, this Act is in the main only an enumeration of the common law provisions, its purpose was the prevention of a specific violation of the imposition of specific penalties. We find then that Judge Tandis follows the real spirit of the Act in exercising the discretion entrusted to the judiciary by imposing a fine of $29,240,-000 upon the defendant. This discretion is not a power which may or may not be exercised acording to the peculiar inclination of the particular occupant of the bench, but is a part of the duty of the judge as a trial court. *Goodwin v. State*, 51 S. E. (Ga.) 598.

IS THE ACTION BY A DEPOSITOR AGAINST A BANK FOR WRONGFUL REFUSAL TO HONOR A CHECK, EX CONTRACTU OR EX DELICTO?

While all courts are agreed that when a bank has sufficient funds of a depositor in its possession to honor the depositor's checks drawn on it, and such funds are not subject to any lien or claim, the bank is liable to an action by the depositor for its neglect or refusal to honor his checks, *Wiley v. Bunker Hil National Bank*, 183 Mass. 495, yet they are far from being in harmony as to whether the action is one *ex contractu* or one *ex delicto*.

In the recent case of *Lorick v. Palmetto National Bank of Columbia*, 57 S. E. (S. C.) 527, the plaintiff brought action against the defendant Bank for damages for wrongfully refusing to honor the plaintiff's check. Pending the suit the plaintiff died, and the suit was continued in her behalf by her administrator. The question arose whether the action was one *ex contractu* and survived to the administrator, or whether it was one *ex delicto* and did not. The court held that, although the plaintiff had attempted to bring her action in tort and had failed, yet she should not be deprived of her relief on account of the technicality, and as she had stated facts sufficient to constitute a cause of action *ex contractu* she was entitled to pursue her relief in that form of an action, and such right of action survived to her administrator.

Some decisions are based upon the nature of the wrong done; that is, the breach of contract, or the tort. Others are based upon the extent of the injury; that is, the measure of damages in either case. There are three different opinions as to the nature of such an action. Some courts hold that it is strictly an action *ex contractu*. This view obtains in California, Kansas, Kentucky, Massachusetts and Nebraska. Others hold that the action is one essentially *ex*